

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SARAH BEHNKE HILL :
 UNITED STATES OF AMERICA, EX REL. : Case No. 14-cv-824
 :
 Plaintiffs, : U.S. District Court
 : ED of PA
 vs. : 601 Market Street
 : Philadelphia, PA 19106
 CVS CAREMARK CORPORATION, ET AL., :
 :
 Defendants. : April 26, 2021
 : 12:58 p.m.
 :

TRANSCRIPT OF TELEPHONIC DISCOVERY HEARING
 BEFORE THE HONORABLE MITCHELL S. GOLDBERG
 UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 THE COURT: Who is on the phone for the Realtor?

2 MS. THOMAS: Susan Thomas, Your Honor, with my
3 partner, Joy Clairmont, and my colleague, Jane Goldstein.

4 THE COURT: Good afternoon.

5 And who is on the phone for the Defendant?

6 MR. DOCKERY: Good afternoon, Your Honor. This is
7 Dan Dockery of Williams & Connolly. And also with me on the
8 line is my colleague, Holly Conley.

9 THE COURT: Hi.

10 MR. SINGER: Craig Singer. I'm also on for CVS, the
11 Defendant.

12 THE COURT: Okay. So if you're not talking, could
13 you mute, please. There's some background noise. There you
14 go. No. Still there. All right, that's better, I guess.

15 All right. So understanding the discovery disputes
16 in this case -- let me go back even further. My impression
17 thus far is that everyone's being reasonable and working
18 together, and I don't have any sense whatsoever that there's
19 any games being played or some bad faith discovery vexatious
20 things going on, stuff that judges hate, and I used to hate
21 when I was practicing civil law. So I'm not -- there's not in
22 the column of complaint at all.

23 But understanding discovery disputes in this case is
24 very time consuming because I find, full transparency, I find
25 understanding the Realtor's cause of action and understanding

1 the layers of payment and repayment and who covers what and who
2 gets reimbursement here and how that all works, vis-a-vis the
3 Medicaid program and Caremark's place in all of that, it's
4 complicated.

5 So it's a big investment of time for me, and every
6 time I understand the scheme, unfortunately, for my law clerk,
7 she has to re-explain it to me, then she has to learn it first
8 so. She's has to relearn it, then she has to explain it to me,
9 and I have to read up on a lot of stuff.

10 So all that is to say my overview of the most recent
11 letters is that, and this is a very superficial overview, is
12 that there is the discussion as to whether the disclosures as
13 it relates to Walgreens and Rite Aid, is really a closed
14 discussion because there's an agreement that the discovery has
15 been complied with and that the Realtor keeps pressing to say
16 there's more information from other entities other than
17 Walgreens and Rite Aid that fit into the fraudulent scheme
18 which we're entitled to.

19 And that I said through an order, okay, fair enough,
20 show me documents that show that, and I'll consider ordering
21 further discovery on the part of Caremark. And that's sort of
22 where we are now, as I understand it, through the reading of
23 the letters and here I'm really going to get superficial.

24 Is that a compromise for more information was
25 proposed by Defendant Caremark and that compromise, in theory,

1 has been accepted by the Realtor and if that's the case, I
2 would very much prefer not to spend a lot of energy getting
3 into it and just say sounds good to me, you know, I bluffed
4 that. I'm happy to do that, but I would much rather -- I would
5 much prefer if there's a compromise that's been reached, try
6 the compromise, and I'm saying this to Ms. Thomas -- Schneider
7 Thomas, go ahead with the compromise, see if it's in your view
8 then compliant with what you think you're entitled to under the
9 discovery rules and if it is, my services are not needed.

10 If it is not compliant after you review the
11 compromise information, then come back and see me. I've been
12 pretty available to you folks. I would prefer to go that
13 route. So, Ms. Schneider, is that acceptable, or am I -- did I
14 -- I said a lot, feel free to comment on anything I've said.

15 MS. SCHNEIDER THOMAS: Okay. Thank you, Your Honor.

16 We do appreciate your willingness to allow us to come
17 back if this production is not sufficient. And as we laid out
18 in our letter, we have a number of reasons to have significant
19 skepticism. I suppose the one thing that I most took issue
20 with of what you said was the notion that there has been an
21 agreement that production is completed as to Walgreens and Rite
22 Aid, and that is not at all the case, Your Honor.

23 The instant dispute not only concerns the fact that
24 CVS pharmacy was largely cut out from the production, but also
25 the insufficiency of the production with respect to Walgreens

1 and Rite Aid. Some of that pertains to data, some of which is,
2 we believe, yet to be produced. But some of it pertains to
3 more the manner in which Caremark set and managed the prices to
4 Walgreens and Rite Aid. And we believe that the productions
5 there have been sorely deficient.

6 For example, this offer of these budget files really
7 took us aback because we have been trying for months now to get
8 some clarity from Caremark about what type of share files and
9 group document repositories exists where there could be
10 relevant documents, and this has never --

11 THE COURT: Ms. Schneider, in order -- I promise you,
12 I'm happy to do this. In order to take the four steps into the
13 weeds that you're now, you're on step two maybe, in my mind
14 you're in step four, I'm going to -- if we're going to have a
15 full blown discovery conference, it's going to start with you
16 reviewing and making sure I fully understand your cause of
17 action.

18 So it's either let's do that, which I'm fine to do,
19 or it's, Judge, I am willing to try the compromise offered by
20 Caremark with the understanding that I can always knock on your
21 door if the compromise doesn't work. So pick one or the other;
22 what do you want to do?

23 MS. SCHNEIDER THOMAS: I guess what I'm saying with
24 all due respect, Your Honor, is that I'm not sure there is as
25 clear a choice as you're saying because we still feel that the

1 production for Rite Aid and Walgreens has not been sufficient.
2 Now we can take the time, look at what they're proposing and as
3 long as it's clear that we still retain our rights to come back
4 to you on Rite Aid and Walgreens, as well as CVS.

5 THE COURT: You always -- if the discovery in the
6 case is deficient, and you can convince me of that, and
7 everyone's working to get to the point where discovery is
8 compliant, you don't have to thank me for coming back to me,
9 and you can always knock on my door. That's my job. So it's
10 okay. All I'm asking is, do you want to get into this now, or
11 do you want to explore their compromise?

12 MS. SCHNEIDER THOMAS: If you're willing --

13 THE COURT: I'll make the decision. Let's get into
14 it now. Okay. I got you on the phone, let's do it.

15 So I think I am pretty sure that I have a good handle
16 on your cause of action, but without giving me like a half hour
17 opening statement, explain to me your theory of the case
18 succinctly as you can.

19 MS. SCHNEIDER THOMAS: Okay, Your Honor. Thank you.

20 The case turns on whether or not Caremark as a PBM
21 accurately reported the prices that it paid to pharmacies for
22 Med D claims through the Part D plans, Aetna and SilverScript.
23 The payment process takes place at two levels, essentially a
24 point of sale, which is called PDE in the lingo, prescription
25 drug event, and then also a trailing reconciliation called DIR,

1 direct and indirect remuneration.

2 In order for us to have visibility into the prices
3 that Caremark actually paid the pharmacies, we need to see,
4 first of all, what they purport to have paid at point of sale
5 and then the DIR is meant to cover adjustments and
6 reconciliations and other compromises as to price that may have
7 taken place after the point of sale.

8 THE COURT: And two of the pharmacies are Walgreens
9 and Rite Aid, correct?

10 MS. SCHNEIDER THOMAS: That is correct, Your Honor.

11 THE COURT: All right. So take me through -- it's
12 easiest for me to understand is I am a insured of Aetna and I'm
13 at the pharmacy counter and take me through and explain to me
14 how Caremark is involved in that?

15 MS. SCHNEIDER THOMAS: Okay. So Joe Sr. goes up to
16 Rite Aid as a Medicare Part D beneficiary and submits a
17 prescription from his doctor for a generic drug, and Rite Aid,
18 the pharmacy, is on a data platform with Caremark, the PBM,
19 that allows Rite Aid to enter this prescription to see whether
20 Joe Sr. is really entitled to Med D, to see whether there is a
21 co-pay, to see whether he's in the donut hole, to see all kinds
22 of things that are managed by Caremark the PBM.

23 Caremark stands between say SilverScript, a part D
24 plan, and Rite Aid, the pharmacy, essentially as the middle
25 man. And so rather than SilverScript who provides the

1 insurance to Joe Sr. doing all that --

2 THE COURT: I thought Joe Sr.'s insurance company was
3 Aetna.

4 MS. SCHNEIDER THOMAS: Well it could be either, Your
5 Honor. It doesn't matter.

6 THE COURT: Keep it simple. Don't make other
7 entities -- it's Aetna. I just want to understand the process.
8 So Joe Sr. goes to Rite Aid --

9 MS. SCHNEIDER THOMAS: Okay. Before you --

10 THE COURT: You've got to let me ask my questions.
11 Joe Sr. goes to Rite Aid, hi, I'm an Aetna insured and here's
12 -- I need to pick up my prescription, and Rite Aid goes into
13 some data bank that Caremark manages and Caremark figures out
14 what kind of co-pay and what Medicare is going to pay and what
15 Aetna's going to pay, right?

16 MS. SCHNEIDER THOMAS: Correct.

17 THE COURT: Okay. And so the fraud occurs, as I
18 understand it, in that Caremark is manipulating the numbers in
19 what way?

20 MS. SCHNEIDER THOMAS: So Caremark and if Your Honor
21 would indulge me and look at page 12 of our appendix, or I'm
22 sorry, page 9 of our appendix, Caremark has an agreement with
23 Rite Aid for all of the business for which Caremark, you know,
24 is helping to facilitate claims on behalf of commercial
25 insurers, on behalf of Med D insurers, so it's on behalf of

1 Aetna Med D, it's on behalf of SilverScript Med D, it's on
2 behalf of multiple commercial insurers.

3 Caremark has a contract with Rite Aid and as you'll
4 see on page 9, Caremark has an overall generic effective rate
5 and what that means that is a discount off of AWP, AWP
6 essentially being the list price for pharmaceutical products.

7 As you'll see in that slide, the discount that had
8 been negotiated between Caremark and Rite Aid was 77.1 percent
9 off of AWP. And what that means is that on average, Caremark
10 was going to pay Rite Aid, whether it was Med D insureds or
11 commercial insureds, SilverScript or Blue Cross, it doesn't
12 matter, Caremark was going to pay Rite Aid at the rate of
13 \$22.90 on average. That's hypothesizing a \$100 AWP drug.

14 I find it easier sometimes to think about what
15 they're paying instead of the discount rate because it helps
16 explain the extent of the differential. But as you'll see on
17 that page 9, and I do apologize, Your Honor, this isn't like
18 going on with the beneficiary who's standing there, but this is
19 what's driving the prices that show up when Rite Aid goes into
20 that database to figure out what the cost of the drug is going
21 to be.

22 So the fraud is that Caremark specifically and
23 deliberately has this global GER with Rite Aid the
24 pharmacy --

25 THE COURT: Please don't use acronyms.

1 MS. SCHNEIDER THOMAS: Okay. Has a global discount
2 rate, the generic effective rate, and that is the first column
3 of this chart that you're looking at, that says that Caremark
4 will pay to Rite Aid for all the drugs that Rite Aid dispenses
5 to beneficiaries of any types of plans for which Caremark is
6 the PBM, so they will pay Rite Aid at the rate of AWP minus
7 77.1.

8 But Caremark refines that. It's not of any
9 particular significance to Rite Aid, but Caremark actually
10 plans, and that's why this is an update on network strategy,
11 that it will pay Rite Aid for Med D claims at a discount rate
12 of AWP minus 75.8 percent.

13 In other words, it will pay Rite Aid \$24.20 on
14 average for that hundred dollar drug. It will pay Rite Aid on
15 commercial claims \$22.10. So Caremark is choosing to pay Rite
16 Aid in the aggregate different amounts, higher for Med D, than
17 it is going to pay Rite Aid for commercial, you know, clients,
18 you know, patients that show up. So that is the gist of the
19 fraud.

20 THE COURT: Why is that fraudulent?

21 MS. SCHNEIDER THOMAS: Because the price that gets
22 reported to CMS is only the \$24.20 that Caremark is ostensibly
23 paying Rite Aid for Med D claims, but at the end of the year,
24 and if you -- again, if you would indulge me and look to page
25 13 of the power point, at the end of the year, Caremark will

1 have -- and these numbers are slightly different because these
2 are actual numbers from 2014. Caremark will have paid Rite Aid
3 for Medicare claims, \$22.40, it will have paid Rite Aid for
4 commercial or non Medicare claims, \$18, but if you look in
5 column D, the effective discount rate, the actual discount
6 rate, was the same across Medicare and non-Medicare.

7 And at the end of the year, Caremark just screws up
8 with Rite Aid so that it ends up paying Rite Aid at that 80.4
9 percent discount rate. So it doesn't really pay Rite Aid the
10 amount that it purports to pay at point of sale on the CMS, you
11 know, on the Med D claim, but the only price that it reports
12 through to CMS is that price. Caremark does not allow --
13 Caremark does not itself report and it does not allow the plans
14 to report because the plans don't even have this information.

15 The fact that there is this true up with the pharmacy
16 such that that price that was paid initially is either -- can
17 be looked at as a sham price at the beginning or --

18 THE COURT: Who's the victim? Who's the victim?

19 MS. SCHNEIDER THOMAS: CMS.

20 THE COURT: The Government entity?

21 MS. SCHNEIDER THOMAS: So in 2010 --

22 THE COURT: CMS. Please don't use acronyms.

23 MS. SCHNEIDER THOMAS: I'm sorry. The Center for
24 Medicare and Medicare Services that runs Part D.

25 THE COURT: All right. So say it -- I feel like it's

1 a Socratic method. I apologize. Say it -- say the fraud
2 without giving me all the acronyms and all of the numbers. The
3 fraud is perpetuated -- I'll give it a shot and you can tell me
4 if I've got it.

5 The fraud is perpetuated by Caremark who manages this
6 whole system and the system is the insured, the senior insured,
7 the pharmacy and then the insurance company for the insured and
8 the Medicare system. Caremark is in that whole chain, they're
9 a manager, and what they do is, they represent one percentage
10 of payment to the pharmacy here, Rite Aid, so that -- which is
11 not accurate so that they can collect more from Medicare who is
12 the victim, is that close?

13 MS. SCHNEIDER THOMAS: That is absolutely correct,
14 Your Honor. There's another step to it, but as far as you went
15 that is absolutely correct.

16 THE COURT: One step at a time. So I have another
17 question then. So you've alleged that they've done that with
18 Rite Aid and you've alleged that they've done that with
19 Walgreens.

20 And as I understand this discovery dispute here, you
21 want to -- or one of the discovery disputes, you requested, and
22 I do know that Defense counsel is on the line so I haven't
23 forgotten you, you've requested a lot of information about
24 those two entities, that is Walgreens and Rite Aid, you've
25 received, according to Defense counsel, millions of documents,

1 and they've done a good job explaining how much effort they've
2 put into this, and as I understand the latest dispute, you are
3 now saying it's just -- it's not just -- this fraud is not just
4 Walgreens and Rite Aid, it's other pharmacies to which I said
5 -- to which Defendant said, there's no proof of that, we don't
6 do business with other entities. To which I said, okay, unless
7 and until you can show me, you Plaintiff's counsel, can show me
8 that you do business, that Caremark, I'm sorry, does business
9 with other entities, I'm not going to force them to produce
10 documents. I thought that's where we were. No?

11 MS. SCHNEIDER THOMAS: That -- Your Honor, that is
12 close to where we are except first, we did not allege this
13 fraud just as to Rite Aid and Walgreens. There is no
14 limitation to just several pharmacies in our claim.

15 THE COURT: Okay. That's fine. Show me then a
16 document that proves to me that there is the type of fraudulent
17 scheme that you've just described with an entity other than
18 Rite Aid and Walgreens, such that I would force Caremark to go
19 in and produce documents. And that proof has to be, in my view
20 presently, as you've explained and you've said, there's a
21 contractual business relationship between Caremark and Rite Aid
22 and Caremark and Walgreens and Defendants have said she's
23 right, Judge, and that's why we're being so compliant. Show me
24 where there are other business relationships like that.

25 MS. SCHNEIDER THOMAS: Okay. Happy to, Your Honor.

1 So pages 1 through 9 of our appendix --

2 THE COURT: Okay.

3 MS. SCHNEIDER THOMAS: -- all of which are Caremark's
4 documents, all of which refer to the fact that Caremark in its
5 own terminology --

6 THE COURT: All right. Well take me through it
7 and --

8 MS. SCHNEIDER THOMAS: Okay.

9 THE COURT: You know, I mean 1 through 9, a lot of
10 information. Point out, give me specifics. Go ahead.

11 MS. SCHNEIDER THOMAS: Okay. So on page 1, Your
12 Honor, this is an email from Brian Janusik (phonetic) at
13 Caremark, he is the head of the industry analytics group, which
14 by the way is the group who's share file they are now belated
15 offering to us, and he is explaining how these GER, the generic
16 effective rate caps that we've just been talking about, he's
17 explaining how they work. And it says point blank, Caremark's
18 documents, Caremark's language, caps, who has them and in what
19 networks. I'm hoping your set shows the highlighting but it's
20 like just about where it starts to indent.

21 THE COURT: It does.

22 MS. SCHNEIDER THOMAS: Okay. And it says CVS,
23 meaning CVS pharmacy --

24 THE COURT: Okay.

25 MS. SCHNEIDER THOMAS: RAD, Rite Aid, and WAG,

1 Walgreens, have caps in all our networks. A network is a
2 collection of pharmacies with which the PBM has contracted on
3 behalf of a Med D or commercial plan. So any time you see
4 networks, they're talking about pharmacies.

5 THE COURT: All right. Small point of confusion on
6 my part. Isn't Caremark part of CVS?

7 MS. SCHNEIDER THOMAS: I think it's the other way
8 around. At least the way we use the word Caremark, Caremark is
9 the PBM, CVS is the pharmacy and then there is an entity that's
10 above them all.

11 THE COURT: All right. And what's RAD?

12 MS. SCHNEIDER THOMAS: RAD is Rite-Aid.

13 THE COURT: And WAG is Walgreens?

14 MS. SCHNEIDER THOMAS: Correct.

15 THE COURT: So CVS is part of your client and we have
16 Rite Aid and Walgreens, and my question was show me an
17 additional entity; where's the additional entity?

18 MS. SCHNEIDER THOMAS: CVS, Your Honor.

19 THE COURT: That's you. I thought you said --

20 MS. SCHNEIDER THOMAS: Caremark --

21 THE COURT: I thought you just said that that's your
22 client?

23 MS. SCHNEIDER THOMAS: No sir, that's Defendant's
24 client.

25 THE COURT: That's what I meant.

1 MS. SCHNEIDER THOMAS: Okay.

2 THE COURT: I'm sorry. That's what I meant.

3 MS. SCHNEIDER THOMAS: Caremark -- I mean it's kind
4 of not our fault that Caremark owns one of the biggest pharmacy
5 chains, but what we allege and what these documents demonstrate
6 is that Caremark, perhaps not surprisingly, was committing this
7 same fraudulent behavior through its own pharmacy, CVS. In
8 other words, it was overpaying on Med D claims and then not
9 accurately reporting to the Centers for Medicare, Medicaid
10 Services, MMS.

11 THE COURT: All right. Let me ask you a couple
12 questions again. So your view, and I'd rather not get into the
13 whole org chart, but for simplicity's sake, Caremark's the
14 principal and there's a bunch of subsidiaries. Caremark is the
15 pharmacy management entity and CVS is an actual pharmacy, and
16 you're claiming that this whole scheme was purported through
17 CVS, as well, right?

18 MS. SCHNEIDER THOMAS: Correct. That is correct,
19 Your Honor.

20 THE COURT: And you're telling me, and I'm sure that
21 you've requested discovery from the Defendants regarding this
22 scheme from CVS, right?

23 MS. SCHNEIDER THOMAS: That is correct, Your Honor.

24 THE COURT: And you're telling me that that discovery
25 is deficient.

1 MS. SCHNEIDER THOMAS: I'm sorry, is?

2 THE COURT: Deficient. Is that your position?

3 MS. SCHNEIDER THOMAS: Well, essentially, Defendants
4 have told us that they don't think CVS pharmacy is part of this
5 case and therefore they don't really have to produce discovery
6 at all about CVS pharmacy. But there's certainly various
7 documents, including the nine that start off our appendix, you
8 know, where CVS is mentioned because it was clearly grouped
9 with Walgreens and Rite Aid in terms of how these discount
10 rates were managed.

11 And then we also have documents that are more towards
12 the second half of our appendix which show that even though
13 there was not the clean-cut reconciliation that we were just
14 talking about on pages 9 and 13, I think it was, as exists with
15 Rite Aid and also with Walgreens although we didn't include all
16 that here.

17 But even though the reconciliation at the end of the
18 day to bring the prices down to a lower rate than what was
19 ostensibly being paid at point of sale and what was the only
20 price reported through to the government. Even though they
21 don't have clear cut a reconciliation, that is because CVS
22 pharmacy is a related in the family company where not
23 everything needs to be documented that way. And we see
24 starting on pages 14 through 18, I think it is --

25 THE COURT: So the answer to my question, you've

1 requested similar information from Caremark that you requested
2 for Rite Aid and Walgreens as it relates to CVS and the
3 Defendant's responses have been we don't have to produce any of
4 that, is that what you're telling me?

5 MS. SCHNEIDER THOMAS: Essentially. They have slowly
6 over time begun to give us little bits and pieces. They have,
7 as is evidenced by some of our documents that mention CVS
8 pharmacy, they obviously have produced some documents that
9 mention CVS pharmacy, but their big picture position has been
10 that this didn't happen through CVS pharmacy and we don't have
11 to give you, basically, discovery about CVS pharmacy.

12 THE COURT: Is that -- Mr. Dockery, understanding a
13 lot of things have been said, but please answer my specific
14 question. What is your client's position regarding discovery
15 as it relates to CVS pharmacy?

16 MR. DOCKERY: Thank you, Your Honor.

17 Putting aside the compromised offer that we've made
18 and putting aside the way that discovery was structured --

19 THE COURT: I just -- Mr. Dockery, I asked you to
20 answer a very specific question.

21 MR. DOCKERY: And that's what I am doing. There's a
22 one --

23 THE COURT: No, you're not. You're saying what
24 you're putting aside. I'm asking you a very specific question.
25 I'm not concerned right now with what you're putting aside.

1 MR. DOCKERY: Okay.

2 THE COURT: I'm asking you, what is your position
3 regarding the requested discovery as it relates to CVS
4 pharmacy?

5 MR. DOCKERY: Our position, Your Honor, has been that
6 the requested discovery as to CVS pharmacy was inappropriate
7 and over burdensome and is not relevant because (audio skips)
8 an agreement with Caremark the way that Rite Aid and Walgreens
9 did have an agreement with Caremark that guarantees.

10 THE COURT: Say that again. You cut out a little
11 bit.

12 MR. DOCKERY: Sorry. I think there was a phone call
13 coming in on my line and probably beeped me out.

14 Our position has been that the discovery as to CVS,
15 as a general matter, is not appropriate in this case. It is
16 over burdensome, it is irrelevant because the agreement between
17 CVS and Caremark did not contain a GER guarantee which is what
18 Rite Aid and Walgreens had in their contract with Caremark.
19 That's been our general position.

20 THE COURT: And explain -- you probably just did, but
21 explain and expand how the relationship between Caremark and
22 CVS is different than the relationship between Walgreens and
23 Rite Aid.

24 MR. DOCKERY: (Indiscernible) actually take a look at
25 the documents that were later provided. And if you take a look

1 at page 1 of their appendix.

2 THE COURT: I'm there.

3 MR. DOCKERY: Okay. Now, this part isn't highlighted
4 but that definition under GER caps, the first two sentences are
5 the GER caps are used to limit the generic effective rate and
6 that GER caps are generally contractually set. Okay. So you
7 can set a GER guarantee in a client contract or in a pharmacy
8 contract they will operate in different ways, but you can have
9 a contractual guarantee.

10 But a cap for purposes of this document is something
11 that is a limit, an internally set limit that you can measure
12 against, and it need not originate from a contract. And just
13 because you have a GER cap, does not mean you have any kind of
14 contractual guarantee. The
15 two are often associated, but not always associated. And if
16 you take a look at page 6 of their appendix, you can see how
17 this distinction applies to Walgreens, Rite Aid, and CVS.

18 So if you look at page 6, there is a reference to
19 pharmacy guarantee management, and the very first bullet reads:
20 IA -- that's industry analytics -- currently tracks RAD, Rite
21 Aid, and WAGS, Walgreens, to an overall GER, BER, and
22 (indiscernible) guarantee. We also measure FEP, Amerigroup,
23 and Med D for specific WAGS, Walgreens guarantees. Okay. So
24 that is referencing the contractual guarantees with Walgreens
25 and Rite Aid that are being tracked. Then second, IA, industry

1 analytics, tracks and reports a CVS GER and manages the overall
2 budget.

3 So your observation that the two entities are related
4 has an important consequence. Entities, regardless of whether
5 or not they had any kind of contractual obligations, even if
6 they were completely separate and had no contractual
7 obligations, they would need to budget for things like this.
8 They would need to be able to budget and forecast and project
9 what GER they expected to get, and then they would need to
10 measure to see whether they're above that, below that,

11 And with respect to CVS and Caremark, both of which
12 are under the same ultimate parent company, even though they
13 have different groups of people that are running the business
14 on each side, they were measuring -- Caremark was measuring
15 issues are with respect to CVS to a budgeted number and
16 managing it, but they had no obligation to CVS, and
17 importantly, whether they were above that number or below that
18 number at the end of the year, and they, you know, could be on
19 either side, there was no ultimate reconciliation in the form
20 of a payment.

21 With Walgreens and Rite Aid, you know, Ms. Thomas is
22 incorrect in saying that there was a true-up at the end of the
23 year.

24 THE COURT: Let me ask you this. What is on page 6
25 where Plaintiff has it highlighted? What's IA mean?

1 MR. DOCKERY: That's industry analytics.

2 THE COURT: Okay. Was -- second question, was
3 Caremark the pharmacy manager for CVS?

4 MR. DOCKERY: Your Honor, it's a little bit
5 different. We're the pharmacy manager, the PBM, for clients,
6 and we have contracts with pharmacies as providers, so the CVS
7 was one of many pharmacies that was a provider, and CVS
8 contracted with -- or Caremark contracted with CVS Pharmacy so
9 that it's client beneficiaries, Aetna for example, could go to
10 a CVS pharmacy or lots of other different kinds of pharmacies,
11 and get their prescriptions filled there.

12 THE COURT: And how is it -- sounds like that's very
13 similar to Rite Aid and Walgreens.

14 MR. DOCKERY: Well, in the sense it -- the question
15 is, is there a contract with them? The answer, of course, is
16 yes. In fact, we produced that contract.

17 THE COURT: Okay.

18 MR. DOCKERY: And there's contracts, many, many other
19 pharmacies.

20 THE COURT: So then if there's a contract, like
21 there's a contract with Rite Aid and Walgreens, and Caremark is
22 in the pharmacy management mix for submission of claims like
23 Rite Aid and Walgreens scenarios, and you've acknowledged that
24 you -- that discovery is fair game on Rite Aid and Walgreens.
25 The difference is there's no written -- what's the difference?

1 I'm missing the difference between Walgreens, Rite Aid, and CVS
2 Pharmacy.

3 And you're drawing a pretty big line in the sand
4 saying we will produce and have produced all these -- all this
5 information for Walgreens or Rite Aid and not CVS, and the
6 touchpoint I think has to be, I think has to be, well, you've
7 got to prove to me, you've got to convince me, Mr. Dockery,
8 that because of the difference, there's no chance that the
9 fraud as alleged could be perpetrated vis a vis CVS.

10 MR. DOCKERY: Okay.

11 THE COURT: So go ahead, convince me.

12 MR. DOCKERY: Sure. So Your Honor, let's take a
13 quick look at an example, or it's not actually an example, but
14 it will help you sort of understand the difference, if we take
15 a look at 13.

16 THE COURT: Okay.

17 MR. DOCKERY: A document that's later made up. This
18 document is not a CVS document, okay?

19 THE COURT: Uh-huh.

20 MR. DOCKERY: A Caremark document, a document they
21 made up, and here, what they're saying is that there is a
22 negotiated discount, and an effective paid discount, and an
23 underpayment to Rite Aid, and then they over on the right-hand
24 side, they basically make up numbers for a drug using those
25 discounts. This is again, made-up numbers for them. For Rite

1 Aid and for Caremark, and for Walgreens, the price that's going
2 to be reported for an individual drug will be based on their
3 contracts, and it will be based on a formula known as the
4 lowest formula, it will have nothing to do with these
5 guarantees, and that number gets reported, and that number is
6 accurate?

7 THE COURT: Because of the contract.

8 MR. DOCKERY: Right. It is the correct number under
9 the contract.

10 THE COURT: Go ahead.

11 MR. DOCKERY: Rite Aid and Walgreens have a provision
12 that's separate from how you calculate the price for an
13 individual drug, included a guarantee to the pharmacy that said
14 if average (indiscernible) Caremark as to the pharmacy were
15 below a certain amount, that Caremark would make up the
16 difference to the pharmacy. This was a one-way guarantee.
17 Under no circumstances would the pharmacy pay Caremark. So
18 Caremark only had a downside here, okay? And it was aggregate
19 done at the end of the year based on all prescriptions. Okay?

20 So under those circumstances, there is a -- at least
21 a scenario where at the end of the year, a payment might be
22 made by Caremark to the pharmacy on a guarantee. That is a
23 possibility under the Rite Aid and Walgreens contracts. We
24 don't think that affects what price needs to be reported, but
25 it is a possibility under the contracts, and if Relator's going

1 to argue that that possibility somehow affects what price --

2 THE COURT: Yeah, I got that. So that's different
3 than the CVS situation how?

4 MR. DOCKERY: There's no possibility that there is a
5 payment by Caremark to CVS at the end of the year based on some
6 guarantee because there is none, and --

7 THE COURT: And that's reflected in the contract
8 between Caremark and CVS which you've turned over?

9 MR. DOCKERY: That's correct. And that's also true
10 of most contracts from that era. From that era, the -- it was
11 actually unusual that the Rite Aid and Walgreens contract
12 contained a GER guarantee. That was not the norm that --

13 THE COURT: Say it again. So because there's no
14 contractual language regarding fill in the blank, it's
15 impossible for the same type of fraud alleged with Walgreens
16 and Rite Aid to have been perpetrated, therefore, discovery
17 shouldn't be allowed. Fill in those blanks for me, please.

18 MR. DOCKERY: Right. I'm sorry, Your Honor, that
19 typically is correct. However, part of why we offered to
20 make -- I proposed that not only do the contracts back up our
21 explanation and our understanding of how the CVS contracts are
22 sort of different from Walgreens and Rite Aid here, and by the
23 way, it's not a fraud as to Walgreens and Rite Aid, it's not
24 even close.

25 THE COURT: I know, I know, I know, I know, I know.

1 I know you're not conceding for it, but I'm asking you to say
2 again what is missing in the contract with CVS that's in the
3 contract with Rite Aid and Walgreens which makes discovery not
4 necessary as it relates to CVS? Say it again.

5 MR. DOCKERY: A guarantee. Any type of aggregate
6 pricing term that is a guarantee, a minimum guarantee on
7 generic effective rights. You know --

8 THE COURT: Okay. Why does the guarantee take the
9 idea, understanding you're not conceding a fraud, why does the
10 guarantee make a difference?

11 MR. DOCKERY: The guarantee makes a difference
12 because Plaintiff's entire argument -- entire argument is
13 premised on aggregate discount rates that are guaranteed and
14 later attempts to recast those as the prices, despite the fact
15 that the prices for the drugs (indiscernible) individual prices
16 that are ultimately, if you have such a guarantee, averaged up
17 into that guarantee.

18 So in other words, if you have a guarantee in a
19 contract, even though Relator's argument is wrong, you at least
20 then have an aggregate term, some term of an agreement, that
21 you can say, look, there's an aggregate term, and the aggregate
22 term is different than this particular individual transaction
23 that occurred on a Tuesday, you know, of a particular drug.

24 THE COURT: Okay. Ms. -- let me interrupt you for a
25 second.

1 Ms. Schneider, please respond to Mr. Dockery's
2 recitation -- well, please respond in this specific issue.
3 He's differentiated the CVS contract and the Rite Aid,
4 Walgreens' contract, and has explained to me, and I'm pretty
5 sure I understand it, why that makes the CVS materials non-
6 discoverable. Please respond to that specific issue.

7 MS. SCHNEIDER THOMAS: Yes. Yes, certainly, Your
8 Honor. So initially, Caremark was arguing that CVS did not
9 even have an effective rate. Then when we came back with the
10 documents showing that, indeed, there is this effective rate,
11 they said well, it wasn't contractual. Then when we came back
12 and said, but it operated in the same way and Caremark
13 consistently treated these three pharmacies as a group. Then
14 they came back and they said well, there's no reconciliation at
15 the end of the day.

16 So regardless how Caremark may have characterized its
17 relationship with CVS Pharmacy, and even if individuals at
18 Caremark referred to it as a GER cap, which does have a similar
19 meaning as a guarantee, it's like this is the most, or
20 sometimes it's the least that we will be paying you. So --

21 THE COURT: That's what I heard him say. I heard him
22 say CVS contract. I heard him say there is a CVS contract,
23 clearly. So whatever's said in the past, he's on record saying
24 there was, and he said he's --

25 MS. SCHNEIDER THOMAS: Oh, no, there's definitely a

1 contract.

2 THE COURT: Yeah, and I heard him say that there's no
3 guarantee payments in the CVS contract, therefore, the fraud
4 can't be perpetrated. That's what I want you to respond to.

5 MS. SCHNEIDER THOMAS: Okay. Basically, the fact
6 that there is no guarantee is largely irrelevant to the fraud
7 that we allege. This case is not about generic effective rates
8 or guarantees for reconciliations, it is about improper price
9 reporting, and even without a spelled-out reconciliation with
10 its, you know, family member, CVS Pharmacy, there was still
11 benefit value being taken to the enterprise, which is the term
12 that Caremark uses for the big corporate entity encompassing
13 the PBM and the pharmacy, they were still taking profit,
14 essentially, value from overpaying CVS Pharmacy on the Med D
15 claims, and I would say that is best stated on page 18.

16 So page 18 is sort of little added comments that were
17 in the spreadsheet that is page 17, and what it says is even on
18 a transparent retail client, transparent means pass-through,
19 which is what CMS ordered for Medicare Part D, effective 2010,
20 that there be pass-through pricing such that there's no profit
21 or spread built into the drug price, a PBM will make its money
22 through administrative costs, but not by marking up the drug
23 cost.

24 And so what they're saying on page 18 is the higher
25 the retail GER, that's guaranteed effective rate that we've

1 been talking about, on a transparent or pass-through client,
2 ultimately impacts us as an enterprise, that's the overall
3 corporation.

4 If they give better prices to pass-through clients,
5 in other words, they give better drug prices to someplace like
6 Aetna, and they should be giving them the actual prices they're
7 paying the pharmacy at the end of the day, but if they give
8 better prices, like if they pass-through to Aetna the better
9 prices, the lower prices that they've been able negotiate with
10 a pharmacy, here CVS, they are saying that impacts the
11 enterprise, the big corporate Daddy, to equal less margin for
12 them.

13 So is it a game? Yes, we would say so. Is it better
14 disguised and camouflaged with their wholly-owned entity, CVS
15 Pharmacy? We would say absolutely.

16 THE COURT: Are there other entities besides CVS,
17 Walgreens, and Rite Aid that you are pursuing?

18 MS. SCHNEIDER THOMAS: Your Honor, at this point we
19 have decided not to, although there certainly are references in
20 the documents to --

21 THE COURT: So the answer's no.

22 MS. SCHNEIDER THOMAS: -- naming GER -- the answer is
23 no because again, if you look back at the documents we
24 presented, you know, like on page 2, Caremark has capped
25 agreements with CVS, Walgreens, and Rite Aid.

1 THE COURT: Right.

2 MS. SCHNEIDER THOMAS: Maximum GER's.

3 THE COURT: Okay. Mr. Dockery?

4 MS. SCHNEIDER THOMAS: And it is on and on.

5 THE COURT: Okay. Mr. Dockery, what's your
6 compromise?

7 MR. DOCKERY: Our compromise is -- was actually
8 designed, Your Honor, to avoid you even having to get into all
9 of this. We're basically giving them everything on CVS, in the
10 industry analytics drive for these years. Industry analytics,
11 you may recall from that, you know, a few of these pages,
12 covers both the tracking of the budget with respect to CVS and
13 Caremark, and also the guarantees as to Walgreens and Rite Aid.
14 Now, the --

15 THE COURT: Wait, wait, hold that thought. Hold that
16 thought. Ms. Thomas, why is that not sufficient?

17 MS. SCHNEIDER THOMAS: We hope that it would be
18 sufficient, Your Honor, our reasons for severe skepticism are
19 that because we do not believe or understand that the game was
20 played in precisely the same way with their wholly-owned CVS
21 subsidiary as it was with the unrelated Walgreens and Rite Aid,
22 we accept their representation that the balancing and the value
23 that Caremark, the overall entity was able to pull out of those
24 inflated payments that it procured from Part D, took place in a
25 somewhat different manner, likely higher up the chain or

1 through this enterprise value, or through the balancing that we
2 were just talking about on slide 18 I think I was.

3 THE COURT: Do you want full -- full circle, do you
4 want, not a trick question, no hidden agenda, I'm very
5 interested in your views and judgment, Ms. Thomas. Do you want
6 me to decide whether CVS's information is discoverable to the
7 extent that the other two entities are, Walgreens and Rite Aid?
8 Or do you want to review the documents that Mr. Dockery has
9 proposed to produce as it relates to CVS and then decide what
10 you want to do?

11 MS. SCHNEIDER THOMAS: I wish I had a clear answer to
12 that question, Your Honor.

13 THE COURT: I actually -- actually, a lot of this
14 isn't that clear in my head but I thought that was a very clear
15 question, so --

16 MS. SCHNEIDER THOMAS: It's a very clear question.

17 THE COURT: You got to answer it.

18 MS. SCHNEIDER THOMAS: And my answer --

19 THE COURT: What is it?

20 MS. SCHNEIDER THOMAS: It's my ability to answer that
21 is less clear.

22 THE COURT: Okay.

23 MS. SCHNEIDER THOMAS: Because we would like, I mean,
24 we would like to play fair and attempt to compromise. We would
25 like to show our experts the additional information that's

1 being provided. We don't think it's going to be sufficient,
2 but if Your Honor is okay from a --

3 THE COURT: How do you know --

4 MS. SCHNEIDER THOMAS: -- timing perspective --

5 THE COURT: How do you know that something you
6 haven't seen is deficient?

7 MS. SCHNEIDER THOMAS: I can only tell you what we
8 believe, Your Honor. So what Caremark has described this as is
9 the place where the reconciliations with Walgreens and Rite Aid
10 are spelled out and documented and papered and whatever.

11 Caremark has also said that that same type of
12 reconciliation does not happen with CVS Pharmacy, and that's
13 why we're concerned that in this folder, this isn't where the
14 true-up or the balancing with CVS Pharmacy, it's wholly-owned
15 entity, would have taken place, which was why in our discovery
16 requests, we asked for documents pertaining to intercorporate
17 arrangements, revenue recognition, that was achieved through
18 Caremark's pricing practices regarding CVS Pharmacy.

19 THE COURT: Okay. Here's what we're going to do.

20 MS. SCHNEIDER THOMAS: And they said it's not --

21 THE COURT: Here's what we're going to do.

22 MS. SCHNEIDER THOMAS: -- going to be here.

23 THE COURT: Here's what we're going to do.

24 MS. SCHNEIDER THOMAS: Okay.

25 THE COURT: I could have had -- I could have the wool

1 being pulled over my eyes, or whatever expression you want to
2 pick, but my impression is that Caremark is -- has not been
3 hiding the ball, that they have been pretty fair and diligent
4 in their discovery production. As a good litigator, you
5 always, you know, want to have a healthy amount of skepticism,
6 Ms. Thomas.

7 My impression is that care -- you know, other than
8 it's a big case and it's complicated and you're dealing with
9 big numbers and giant companies and all that, again, my
10 impression is that Caremark is not trying to hide ball. I
11 could be wrong, I could be naïve, but that's my impression thus
12 far. So the choice is then do I decide now and just sort of
13 bite the bullet and decide -- I think there are my choices --
14 decide now whether the CVS materials are discoverable or not,
15 or go with the compromise position offered by Mr. Dockery?

16 The downside of that in my view is that, you know,
17 we've been on the phone now an hour and I feel like I'm
18 proficient enough to make some decision, sort of, and I worry
19 if I go with the compromised view, you still won't be satisfied
20 and we'll have to do this all over again. But I don't mind.
21 It's interesting. It's challenging to figure it out. So am I
22 right, Mr. Dockery? So I'm going to go with the compromise.
23 That's what we're going to do.

24 So Mr. Dockery, have any of the -- do you have
25 additional discovery, and I'm putting all the -- that discovery

1 in the bucket of the compromised position; has that been turned
2 over or it's about to be turned over?

3 MR. DOCKERY: Your Honor, it's about to be. It's
4 a -- there's actually a lot of files there --

5 THE COURT: Okay.

6 MR. DOCKERY: -- and a lot of volume, so we're going
7 to be in the process of reviewing that.

8 THE COURT: Okay.

9 MR. DOCKERY: (Indiscernible.).

10 THE COURT: And what are we calling that for purposes
11 of my order? The additional discovery is called CVS -- what
12 are we calling it?

13 MR. DOCKERY: Well, that's a good question. So I
14 think you could call it the CVS industry analytic share drive
15 material.

16 THE COURT: Okay. And how much time do you need to
17 produce it?

18 MR. DOCKERY: I think we need -- I think we've said
19 we can produce it in two weeks.

20 THE COURT: Two weeks. My order will say it will be
21 produced in two weeks. If you need a couple more days, don't
22 worry about it, just -- but let's keep it, you know, if you
23 need a couple more days, I'm going to have to amend my order,
24 so I don't want to do anything like, you know, a wink and a nod
25 here. If you need a couple of days I'll give it to you, but

1 try to -- the order's going to say two weeks.

2 And then Ms. Schneider, how much time do you need to
3 then review the additional discovery to determine whether in
4 your judgment that discovery is still deficient?

5 MS. SCHNEIDER THOMAS: Your Honor, we are hoping to
6 do it as quickly as possible, again, as you noted, without
7 knowing what we're getting.

8 THE COURT: Yup.

9 MS. SCHNEIDER THOMAS: We've been told it's hundreds
10 of files and --

11 THE COURT: Yup.

12 MS. SCHNEIDER THOMAS: -- gigabytes of data. I just
13 don't know how to answer that.

14 THE COURT: Give me your best estimate, understanding
15 that if you come back to me and say we've gotten too much
16 information and the number I gave you is not doable, can I have
17 more time, I'm likely going to say yes. So don't worry.

18 MS. SCHNEIDER THOMAS: WE will make -- we will make a
19 very good faith effort working with our experts and everything
20 else to --

21 THE COURT: Yeah.

22 MS. SCHNEIDER THOMAS: -- to have a sense of this
23 within three weeks of production.

24 THE COURT: Three weeks with a big fat asterisk, that
25 if you make a good-faith effort, as you've done from the second

1 we've interacted, and you need more time, you'll get it, okay?

2 MS. SCHNEIDER THOMAS: Okay.

3 THE COURT: Okay. So that's what our order will say,
4 and then I'm not sure where we are, all of this dispute. My
5 sense is that if this dispute gets resolved either by way of
6 this compromise or I have to, you know, ultimately make a
7 ruling on where to draw the line on the CVS material, once
8 that's resolved, I think then we can sort of step back and
9 reconfigure the discovery process.

10 So I think the smart thing to do is just to put a
11 stay on all the discovery until we resolve this, what seems to
12 me to be a central discovery dispute. Are you good with that,
13 Ms. Thomas?

14 MS. SCHNEIDER THOMAS: In general, yes, Your Honor,
15 although we really would like to start our 30(b)6 deposition,
16 which Defendants have not --

17 THE COURT: Now, why would you want to do that? Why
18 are you saying you want more information, but yet you want to
19 start deposing people without that information?

20 MS. SCHNEIDER THOMAS: Because Defendants keep
21 arguing that we have not been able to identify with sufficient
22 specificity what we need, for example, with respect to the
23 share files, which I did want to address briefly
24 (indiscernible) --

25 THE COURT: Yeah, let's take it one step at a time.

1 You're going to -- I think it's -- I don't mean to second-guess
2 your litigation strategy, but I don't want to do 30(b)
3 depositions and then suppose you get all this information and
4 you convince me, well, this is a goldmine, I need more, and
5 then you've got to do another 30(b) with the new information.
6 One step at a time.

7 So I'm going to stay all discovery pending the
8 resolution of this dispute, and you'll get your 30(b)'s, don't
9 worry. Okay, Ms. Thomas? And that's what we're going to do.

10 MS. SCHNEIDER THOMAS: Okay. Thank you, Your Honor.

11 THE COURT: Okay. Mr. Dockery, anything else?

12 MR. DOCKERY: No, Your Honor.

13 THE COURT: Okay. Thank you both for your time.

14 Take care. We'll issue that order and we'll go --

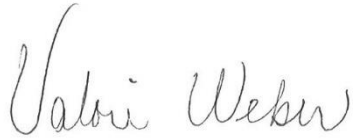
15 MS. SCHNEIDER THOMAS: Thank you, Your Honor.

16 THE COURT: -- and we'll go from there and we'll stay
17 the discovery. Thank you.

18 (Proceedings adjourned at 2:02 p.m.)
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C E R T I F I C A T I O N

I, Valori Weber, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

A handwritten signature in cursive script that reads "Valori Weber". The signature is written in dark ink and is positioned above a horizontal line.

Valori Weber

Date: May 19, 2021